*on the Law of Torts*, Vol. II, sec. 458 would impose liability providing the disease which is subsequently contracted is clearly the result of the weakened condition of the plaintiff's system.

Two analogous groups of cases deal with recovery for injuries aggravated by a later accident or improper treatment by a negligent physician. In *Hoseth* v. *Preston Mill Co.*, 49 Wash. 682, 96 Pac. 423 (1908), the court remarked, "The rule is that the injured person must exercise reasonable care to effect a cure, both as to the selection of a physician and as to his own personal conduct, and if he does so he may recover all damages flowing naturally and proximately from the original injury."

So it has been held that the original wrong doer is liable also for the negligent treatment by the physician. *Loeser et al.* v. *Humphrey*, 41 Ohio St. 378, 52 A.R. 86 (1884); *Tanner* v. *Espery*, 128 Ohio St. 82, 190 N.E. 229, 40 Ohio L.R. 646, 14 Ohio Abs. 672 (1934); *O'Quinn* v. *Alston*, 213 Ala. 346, 104 So. 653, 39 A.L.R. 1263 (1925); *Boa* v. *San Francisco-Oakland Terminal Rys.*, 182 Cal. 93, 187 Pac. 2 (1920). At least if such negligence ought reasonably to have been anticipated, *McIntosh* v. *Atchison T. and S. V. Ry. Co.*, 109 Kan. 246, 198 Pac. 1084 (1921); *Purchase* v. *Seelye*, 231 Mass. 434, 128 N.E. 413, 8 A.L.R. 503 (1918); and if not materially contributed to by the plaintiff, *Wright* v. *Blakeslee*, 102 Conn. 162, 128 Am. 113 (1925).

Similarly the original wrongdoer has been held liable for subsequent injuries to the plaintiff, such as the rebreaking of a leg if the plaintiff at the time was in the exercise of due care, *Stahl* v. *Southern Mich. R. Co.*, 211 Mich. 350, 178 N.W. 710 (1910); *Clayton* v. *Holyoke Street R. Co.*, 236 Mass. 359, 128 N.E. 460 (1920); *Postal Telegraph Cable Co.* v. *Hulsey*, 132 Ala. 444, 31 So. 527 (1901).

LEON P. LOECHLER

# TORTS

## INTERFERENCE WITH PROBABLE EXPECTANCY OF RECEIVING PROPERTY UNDER A WILL

By threats of violence and bodily injury, the defendant prevented his wife from completing the execution of an unattested will which she had drawn, and wherein she had provided a small legacy for the plaintiff, the sister of the decedent. After the death of the wife, the plaintiff, seeking to recover the amount of the proposed legacy, sued the defendant

in tort, alleging that although the decedent had continued to entertain a settled purpose and intent to execute the instrument as a will, she was prevented from doing so by the fright and fear induced by the defendant. The Court of Appeals, affirming the trial court, held for the defendant, ruling that a cause of action in tort can arise only out of the invasion of a legal right, and that until such time as a gift might be made to the plaintiff, she had no interest beyond a mere naked possibility, an interest which was said to be "altogether too shadowy and evanescent to be dealt with by courts of law." *Cunningham* v. *Edward*, 52 Ohio App. 61 (1936).

It is true that the testatrix was under no legal duty to leave the plaintiff anything. If the testatrix had made a will in favor of the plaintiff, she could have changed or destroyed it and the plaintiff would have had no valid complaint. The plaintiff would have had no more than an expectancy during the lifetime of the testatrix; and if no will had been made, the interest of the plaintiff would be more evanescent than the expectancy of a prospective legatee.

The question here, however, is not whether the plaintiff could maintain an action against the testatrix or her estate. The question is whether the plaintiff may maintain an action against the defendant who interfered with the probability that she would receive something from the decedent. The second problem is not necessarily controlled by the first. There is little law upon the exact facts of the principal case, but there are cases which are, to some extent, analogous in which interference with reasonable expectancies of economic and financial advantage has been deemed tortious and legal relief granted.

In the early case of *Keeble* v. *Hickeringill*, K.B., 1809, 11 East 574, an action on the case was permitted to lie against a defendant who frightened wild fowl away from the plaintiff's decoy pond by discharging gun powder, with intent to injure the plaintiff by driving away such game. The court there stated that permitting legal redress for such wrong "seems to be new in its instance, but is not new in the reason or principle of it." Similarly, the defendant's conduct in threatening and coercing workmen away from the plaintiff's quarry was held actionable in case, in *Garret* v. *Taylor*, KB., 1620, Cro. Jac. 567.

In certain labor cases, the probability that employees will continue to work for an employer has been recognized as a right that will be protected against unjustified interference. In the leading case of *Jersey City Printing Co.* v. *Cassidy*, 63 N.J. Eq. 759, 53 Atl. 230 (1902), an injunction was granted to an employer whose labor supply had been cut off by the defendant's threats of violence to potential employees,

such interference being deemed an invasion of the *right* of employers to have labor flow freely to them, a right which has been referred to as a "probable expectancy." In many labor cases the probable expectancy is that workers now employed by the plaintiff will continue to work for him. In the *Cassidy* case the defendant did not interfere with any benefit that the plaintiff was receiving, but the probable expectancy in labor cases includes not only the workers now employed, but also others who may wish to be employed by the plaintiff. The plaintiff's interest in the property of the decedent in the instant case might well be compared with the employer's probable expectancy of obtaining additional employees.

Further support for the plaintiff's position may be found in those cases wherein the intentional or negligent conduct of the defendant prevented a third person from giving aid to the plaintiff. So, where a railroad company unlawfully blockaded a street crossing, thereby delaying the fire department in reaching a fire, and it appeared that but for such delay the department would have reached the fire in time to have prevented it from spreading to another building, the railroad company was held liable for the additional damage deemed to have resulted from its negligence in thus blockading the street. *Hourer* v. *The Chicago, Milwaukee and St. Paul R. Co.*, 236 Ill. 620 (1908), A.L.I. Restatement of Torts, Section 326. Similarly, where it was necessary, in extinguishing a fire, to lay the water hose across a railroad track, and the defendant railroad company negligently ran over and severed the hose, thereby cutting off the water from the fire, which then consumed the building, it was held in an action brought by the owner of the building against the railroad corporation that the defendants were liable for the negligence of their servants in severing the hose. *Metallic Compression Casting Co.* v. *Fitchburg Railroad Co.*, 109 Mass. 277, 12 Am. Rep. 68 (1872), A.L.I. Restatement of Torts, Section 327. In the foregoing case, the plaintiff would have no action against the fire department if it failed to furnish the water. But since the fire department was furnishing or attempting to furnish water, the defendant was held liable to the plaintiff for his unjustified interference with the obtaining of the water by the fire department.

Interference with the expectancy of receiving aid from a third person was held actionable where a defendant railroad company obstructed a highway, thereby preventing a physician from reaching the plaintiff; the defendant was held liable for the damage resulting from the increase in the plaintiff's illness, which would have been prevented had the highway not been blocked. *Terry* v. *New Orleans Great Northern R. Co.*, 103 Miss. 679, 60 So. 729 (1913), A.L.I. Restatement of Torts, Section 328.

Less frequently has the probable expectancy of a legatee of a will been regarded as a right which the law will protect. In the leading case of *Lewis* v. *Corbin*, 195 Mass. 520 (1907), the defendant prevented the plaintiff's deceased father from receiving a legacy under the will of the testatrix, by having a codicil, wherein the legacy was bequeathed, executed in the presence of only one witness, the defendant knowing full well that the laws of the jurisdiction in force at the time required such execution in the presence of more than one witness. The court sustained a demurrer to the petition, on the ground that the pleading was defective in not averring that the testatrix continued to entertain her purpose in regard to the legacy, and that the fraud continued operative to the time of her death and thus caused the loss to the plaintiff. However, by way of dictum, the court considered a charge of fraud a sufficient statement of an actionable wrong, in that the fraud put the plaintiff in a less advantageous position than he otherwise would have occupied in reference to the probability of receiving property under the will, "and this change of position, accomplished by fraud, naturally and probably might deprive him of that which, with fair dealing, he would receive," and the defendant should, therefore, be chargeable with the natural consequences of his act. The *Lewis* case is analogous to the principal case in that in both it was the probable expectancy that the plaintiff would receive something by will which was interfered with, and so the dictum lends some support to the position of the plaintiff here.

In *Kelly* v. *Kelly*, 10 La. Ann. 623 (1855), the plaintiff alleged that the defendants, by force and violence, had prevented the decedent from completing the execution of a will, in which the plaintiff had been named the sole legatee. The court held that while an action will lie against one who by force and violence has prevented a person from making a will in favor of the plaintiff, yet it cannot be maintained without positive evidence that the execution of the will was prevented by the threats and violence charged. The complaint was dismissed, due to the failure of the plaintiff to prove such force and violence. In the principal case it was admitted that the defendant's threats of violence prevented the execution of the will containing the plaintiff's legacy; so here again a dictum lends some support to the position of the plaintiff.

In *Pettit* v. *Morton*, 38 Ohio App. 348, 176 N.E. 494 (1930), the defendant by forgery and fraud secured the execution of a false will, and thereafter destroyed the true will, in which the plaintiff had been named as devisee of valuable hotel property. In allowing the plaintiff to recover, it was decided that an unprobated will was not a "mere nullity," and that it afforded the basis for a cause of action in tort.

Whether this case lends any assistance to the plaintiff in the instant case is debatable, in view of the fact that in the *Pettit* case the plaitniff was the devisee under a fully executed will, while in the principal case, the will was never completely executed.

In concluding the analysis of the possible tort action involved in the instant case, it may be pointed out that there is a recent North Carolina case in which the court permitted recovery in tort under facts strikingly similar to those of the principal case. In *Bohannon* v. *The Wachovia Bank and Trust Co.*, 210 N.C. 679, 188 S.E. 390 (1936), the petition alleged that the decedent had formed the fixed intention and settled purpose of providing for the plaintiff by will or trust instrument, and would have carried out this intention but for the false and fraudulent representations of the defendants. It was held that the plaintiff could recover in tort for the malicious and wrongful interference with the making of a will. This decision seems indicative of the tendency on the part of the courts of law to allow redress in tort for interference with expectancies, and it does not appear too violent to conclude that this trend may reach the stage wherein the interest of the plaintiff in the principal case will be recognized as a reasonable and probable expectancy, in the nature of a property right, and that wrongful interference therewith may form the basis for a tort action.

Under the facts of the instant case, the constructive trust would seem the most satisfactory method of affording redress to the defrauded legatee. "It is eminently fitting that the court of equity should permit the plaintiff, who has been grossly defrauded by the defendant, to utilize the remedial process of the constructive trust," and have the wrongdoer declared a trustee *ex maleficio* for the benefit of the wronged party. Vanneman, "The Constructive Trust: A Neglected Remedy in Ohio." 3 Ohio St. L.J. 1, p. 6 (1937). In *Seeds* v. *Seeds*, 116 Ohio St. 144, 156 N.E. 193, 52 A.L.R. 76 (1927), a constructive trust in favor of the plaintiff was impressed upon the title which a defendant had secured by means of a forged will. Similarly, the court of equity imposed a trust upon the title of an heir who took by inheritance but suppressed the will by which the property was given to the younger sons until the will was produced and probated. *Hampden* v. *Hampden*, 3 Bro. P.C. 550, 1 Eng. Rep. 1492 (1909).

A devisee was again declared a trustee *ex maleficio* in *Winder* v. *Scholey*, 83 Ohio St. 204, 93 N.E. 1098 (1910), wherein, at the time of the devise, the devisee, then fully intending to perform, promised the testator that he would hold the property for another, but after the death of the testator and the probate of the will, refused to fulfill his

obligation. The same result is reached more frequently when the fraudulent intent not to carry out the promise made to the testator existed at the time the devisee promised to hold for or convey to a stranger to the title. *McDowell* v. *McDowell*, 141 Ia. 286, 119 N.W. 702 (1909); *Smullin* v. *Wharton*, 73 Nebr. 667, 103 N.W. 288 (1905); Bogert, Trusts 135 (1921). So also, a constructive trust has been imposed, where the will does not disclose either the trust or the intended beneficiaries and the named devisees orally promised to hold for them, *Grimes* v. *Chew*, 43 U.S. 619, 11 L.Ed. 402 (1894); *Winder* v. *Scholey*, *supra*, even though the will is an absolute devise. Vanneman, *op. cit.*, pps. 1-18.

In the *Seeds* case, *supra*, Marshall, C. J., stated the doctrine as one by which the court of equity prevents any person, who, from the relation in which he stands to another is capable of exercising an undue influence over his mind, from deriving a profit from any transaction which may have arisen by reason of such opportunities of undue influence.

Unfortunately, the Ohio courts have been reluctant to adopt the remedial device afforded by the constructive trust; *Winder* v. *Scholey*, and *Seeds* v. *Seeds*, *supra*, must be classed as either contrary to the weight of authority in the state, or confined to the facts. In *Pettit* v. *Morton*, 28 Ohio App. 227, 162 N.E. 627 (1928), the court refused to impose a constructive trust upon a defendant who, by forgery and fraud, had secured the execution of a false will, and thereafter destroyed the true will, in which the plaintiff had been named as devisee of certain property. As previously noted, the plaintiff recovered in tort in a subsequent suit. *Pettit* v. *Morton*, 38 Ohio App. 348, 176 N.E. 494 (1930). The Court of Appeals distinguished the *Pettit* case from the *Seeds* case upon the ground that in the former the devisee was a stranger, while in the latter he was an heir. This would seem to be a distinction of no legal cogency. In *Kent* v. *Mahaffey*, 10 Ohio St. 204 (1859), the court refused to impose a trust upon the title of a devisee, where a blind testator was prevented by the deception of a disinterested person, from burning his will, and on the death of the testator it was probated. In both that case and the principal case, the court stated that an heir at law could not be declared a trustee *ex maleficio* where, by force or fraud, the heir at law prevents the execution of a will. It has been pointed out by Olney, J., in *Brazil* v. *Silva*, 181 Cal. 490, p. 496; 185 Pac. 174 (1919), that this is precisely what Lord Thurlow had done years before, in *Dixon* v. *Olinius*, 1 Cox. 414, 29 Eng. Rep. 1230 (1805), and it has received the approval of Lord Eldon, *Mestover* v. *Gillespie*, 11 Ves. 638; 32 Eng. Rep. 1230 (1805), and of many writers and judges since. See Vanneman, *op. cit.*, p. 15.

Thus, it appears that by the views taken by the Ohio courts in *Pettit* v. *Morton*, *supra*, and *Kent* v. *Mahaffey*, *supra*, as to the inapplicability of the constructive trust, on the one hand, and that taken by the principal case, refusing relief by an action in tort, on the other hand, the defrauding party is unjustly enriched, and the decedent's intended beneficiary stands remediless. "It is submitted that the existence of a diabolical fraudulent intent and act on the part of * * * an heir who induces his ancestor to die intestate * * * is sufficient and indeed precisely the sort of case to call forth from the chancellor his most effective remedial device—the constructive trust." Vanneman, *op. cit.*, p. 16.

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